LE COPY

Office-Supreme Court, U.S.
FILED
JUN 8 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 99

NACIREMA OPERATING COMPANY, INC.,
Petitioner.

v.

CALMAR STEAMSHIP CORPORATION,
Respondent.

PETITION OF NACIREMA OPERATING COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM L. MARBURY,
JESSE SLINGLUFF,
MATHIAS J. DEVITO,
Attorneys for Petitioner.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Prayer for Writ and Nature of Case	1
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Importance of the Case	5
II. The Opinion Below Misconstrues the Decisions of this Court	7
III. The Decision Below Conflicts with the Decisions in other Circuits	11
Conclusion	13
Appendix A: Opinion of the Court of Appeals	15
Appendix B: The Judgment	20

Table of Citations

Cases

American Mut. Liability Ins. Co. v. Matthews, 182 F. 2d 322 (2 Cir.)	13
Amerocean Steamship Co. v. Copp, 245 F. 2d 291 (9 Cir.)	13
Boston Woven-Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N.E. 657	8
Crumady v. The J. H. Fisser, 358 U.S. 423	6, 7, 8, 9, 10, 14
Hagans v. Farrell Lines, 237 F. 2d 477 (3 Cir.)	11, 13
Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282	6

PAGE

Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal.) 8, 10

Mowbray v. Merryweather (1895), 2 Q.B. 640 7, 12

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 6

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 6, 7, 8

Smith v. Pan-Atlantic Steamship Corporation, 161 F. Supp. 422 (E.D. Pa.) 12

Smith v. Pan-Atlantic Steamship Corporation, 254 F. 2d 600 (3 Cir.) 13

Torres v. The Kastor, 227 F. 2d 664 (2 Cir.) 13

Trygstad v. States Marine Corporation, 150 F. Supp. 556 (D. Ore.) 13

Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 6, 7, 8, 14

Statutes

28 U.S.C. Section 1254 (1) 2

Other Authorities

Restatement of Contracts, Sections 274-279, 295, 315, 397 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

NACIREMA OPERATING COMPANY, INC.,
Petitioner,

v.

CALMAR STEAMSHIP CORPORATION,
Respondent.

PETITION OF NACIREMA OPERATING COMPANY, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRAYER FOR WRIT AND NATURE OF CASE

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 8, 1959, which reverses a holding of the United States District Court for the District of Maryland (THOMSEN, CH. J.) that respondent is not entitled to indemnity for damages allegedly resulting from petitioner's breach of contract to furnish stevedoring services.

The case is governed by the terms of a written contract under which respondent agreed to furnish suitable equipment for stevedoring work, and petitioner agreed to use the equipment in a proper and efficient manner. The trial

court found that respondent, negligently and in breach of its contractual obligation to petitioner, failed to furnish safe equipment, and that this failure was a proximate cause of injury to a longshoreman who recovered damages from respondent. Because of this breach of contractual duty respondent's claim for indemnity against petitioner was denied, although the trial court also found that petitioner negligently and in breach of its contractual duty to respondent failed to handle the equipment in a proper and efficient manner.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported in 164 F. Supp. 628, and is printed at pp. 80-89 of the Joint Appendix filed in the court below and filed with this court along with this petition. The opinion of the Court of Appeals is not yet officially reported, but is printed as Appendix A, *infra*, p. 15 et seq.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on April 8, 1959. No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Where two parties have entered into a stevedore servicing contract, one party undertaking to furnish reasonably safe equipment and the other to operate it in a workmanlike manner, and each party to the contract negligently fails to perform his contractual obligation to the other, with the result that a longshoreman is injured as a direct result of the failure of duty on the part of both parties, may either party recover indemnity from the other for losses resulting from such injury?

STATEMENT OF THE CASE

On December 1, 1955, respondent Calmar, owner and operator of "S.S. PORTMAR," entered into a written contract with petitioner Nacirema, a stevedoring contractor, under which Calmar engaged Nacirema to handle the loading and discharging of Calmar's vessels at Baltimore. The contract provided that Calmar would supply "lights for night work" and "all other cargo handling gear and equipment as needed for efficient stevedoring work" (J. App. 77-78)*, and Nacirema in turn agreed to supply all necessary stevedoring labor and "all stevedoring direction and supervision requisite or necessary for the proper and efficient conduct and control of the work" (J. App. 77).

In connection with the loading of "S.S. PORTMAR" on December 6, 1955, Joseph Oleszczuk, a longshoreman, was struck by a cargo light. He brought suit against Calmar, claiming failure to supply a seaworthy vessel and negligence. Calmar impleaded Nacirema as a third-party defendant.

At the trial of the case, there was evidence from which the jury might have found that in connection with the loading of the "PORTMAR," Calmar had supplied a cargo light which was defective and unsafe in that (a) certain wires which secured the light were not properly attached, (b) the light was not "seized" (taped to the cable), and (c) the light was not equipped with a lanyard (J. App. 82). Calmar's witnesses testified that an unseized light was not unsafe if the wiring was properly secured, and that no lanyard was necessary, but admitted that no inspection had

* References are to the Joint Appendix filed in the court below and filed in this court along with this petition.

been made of the light to determine whether the wires were securely fastened (J. App. 41, 48, 51, 52). There was testimony that Nacirema's employees could have seen that the light was not seized and that it had no lanyard attached (J. App. 35), but there was no evidence that they could have discovered that the wires which secured the lights were not properly attached without disassembling the light (J. App. 51, 52).

There was likewise evidence from which the jury might have found that Nacirema's employees had roughly and improperly thrown the light over the side of the hold (J. App. 43, 49, 57).

At the close of the testimony, issues of fact were propounded by the court to the jury under appropriate instructions, and the jury found (J. App. 71-74):

(1) That "S.S. PORTMAR" was unseaworthy in respect to the cargo light;

(2) That Calmar was negligent in respect to the cargo light;

(3) That the cargo light was lowered in a negligent manner by Nacirema's employees; and

(4) That the negligence of Calmar, the unseaworthiness of the vessel and the manner in which the cargo light was lowered by Nacirema's employees were all proximate causes of the accident.

The jury further found that Nacirema's employees were negligent in using a cargo light that was not seized, but they were not asked to make any finding as to whether this negligence was a proximate cause of the accident (J. App. 74).

The District Court (THOMSEN, CH. J.) thereupon entered judgment against Calmar, and by agreement of the parties reserved for further findings of fact Calmar's claim for indemnity against Nacirema (J. App. 75). After a hearing at which the contract between Calmar and Nacirema was introduced in evidence as the Court's Exhibit No. 1, JUDGE THOMSEN found as a fact that Calmar had breached its contractual duty to Nacirema to supply a reasonably safe and serviceable light (J. App. 82) adding that "if the responsible officers of the ship did not cause the light to be seized, they should have supplied a lanyard or should have seen that the wires were securely attached to the terminal screws." JUDGE THOMSEN concluded that because of this breach of contractual duty, Calmar could not recover indemnity from Nacirema, although he also found that Nacirema had breached its contractual duty to Calmar by the manner in which its employees had handled the light (J. App. 88-89). Since the jury found that both of these breaches were proximate causes of the accident, JUDGE THOMSEN concluded that neither party to the contract was in the position to hold the other liable for the breach thereof.

On appeal, the Court of Appeals for the Fourth Circuit reversed JUDGE THOMSEN, and directed that judgment for indemnity be entered for Calmar against Nacirema.

REASONS FOR GRANTING THE WRIT

I.

The Importance of the Case

That the general subject with which this case deals is one of importance is clearly shown by the fact that in a series of cases this court has granted petitions for certiorari in order to settle questions raised by shipowners

as to their right to claim contribution or indemnity from stevedore contractors in cases where longshoremen have recovered damages for injuries suffered in loading or unloading vessels.

These cases have established—

(1) That where the shipowner and the stevedoring contractor each contribute to the injury, neither party may have contribution or indemnity from the other except pursuant to a contract express or implied in fact obligating the contracting party to furnish such contribution or indemnity. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124; 128-132; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 569;

(2) That the undertaking of a stevedoring contractor to furnish stevedoring services includes a contractual obligation to the shipowner to perform such services without negligence and to indemnify the shipowner from any loss resulting from injury to a longshoreman as the result of such negligence. *Ryan, supra; Weyerhaeuser, supra; Crumady v. The J. H. Fisser*, 358 U.S. 423;

(3) That a shipowner may recover on a breach of the stevedoring contractor's express or implied contract of indemnity, "absent conduct on its part sufficient to preclude recovery." *Weyerhaeuser, supra*, at p. 567.

So far, the decisions of this court have settled the law. Left unsettled, however, is the important question — what conduct on the part of the shipowner is sufficient to preclude recovery on the stevedoring contractor's contract of indemnity? That is the question presented by the present case, and as we shall see, it is a question on which

confusion has been created by the decision of the Court of Appeals in this case. It is obviously important that the industry and the lower courts be given an authoritative guide to help them to define the limits of the doctrine announced in the *Ryan*, *Weyerhaeuser* and *Crumady* cases.

II.

The Opinion Below Misconstrues the Decisions of this Court.

As this court was careful to point out in the *Ryan*, *Weyerhaeuser* and *Crumady* cases, the obligation of the stevedoring contractor to indemnify the shipowner is a contractual one in the nature of a manufacturer's warranty arising out of an undertaking to furnish workmanlike service. In the present case, the trial court found that there was such an obligation on the part of Nacirema, and that Nacirema failed to perform that obligation. However, the trial court also found that there was a similar contractual obligation on the part of Calmar to furnish reasonably safe equipment to Nacirema, which Calmar on its part had likewise failed to perform. The jury has found that these breaches of contractual obligation each contributed to the injury to the longshoreman. On elementary contract principles it would seem that there could be no recovery in such a case. *Restatement of Contracts*, Sections 274-279, 295, 315, 397.

Here the claim for indemnity comes from Calmar which has itself been guilty of a breach of warranty. In *Mowbray v. Merryweather* (1895), 2 Q.B. 640, the vessel supplied a chain to the stevedoring contractor which broke while being used in unloading and injured a longshoreman. Although the stevedoring contractor had been held liable to its employee because it negligently failed to inspect the chain, it was nevertheless held entitled to recover indem-

nity from the vessel on a breach of the vessel's warranty to supply a chain reasonably fit for the purposes for which it was to be used. That case was cited with approval by this court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. at pp. 130, 134. It was followed by the Supreme Judicial Court of Massachusetts in *Boston Woven-Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N.E. 657 (1901), where the opinion was written by HOLMES, C.J. The *Kendall* case was cited with approval by this court in *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. at p. 568.

Not only has Calmar been guilty of a breach of warranty, it has also been guilty of negligence. Calmar was clearly under a duty to use reasonable care to furnish safe equipment to Nacirema. See the careful opinion of JUDGE MATHES in *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959). The jury's finding of negligence on the part of Calmar conclusively establishes a failure to perform this duty. This negligence, as the jury found, was a proximate cause of the injury to the longshoreman.

The court below felt that this case was controlled by *Crumady v. The J. H. Fisser*, 358 U.S. 423, decided just one week before the present case was reached for argument in the Court of Appeals. In the *Crumady* case, the owners of the "J. H. FISSER" had chartered the vessel to Ovido Compania Naviera S.A. Panama. That company in turn entered into a service agreement with a stevedoring contractor, under which it undertook to furnish adequate winches and the stevedoring contractor undertook "to faithfully furnish * * * stevedoring services." The shipowners delivered the vessel to the charterer with the winches and loading gear in good condition, but the employees of the ship failed to make proper adjustment of a safety device which was designed to cut off

the current from the winch if it should be subjected to a dangerous strain.* The employees of the stevedoring contractor negligently placed an excessive load on the gear, the current failed to cut off and the gear broke, injuring a longshoreman. This court held that the shipowners were liable to the longshoreman for failure to discharge a non-delegable duty to supply a seaworthy vessel. Although there was no contract between the shipowners and the stevedoring contractor, the shipowners were held entitled to recover indemnity as third-party beneficiaries of the service contract between the charterer and the stevedoring contractor.

In the *Crumady* case, there was no finding of any breach of contract on the part of the shipowners — on the contrary, it clearly appears from the record that the shipowners delivered the vessel to the charterer in seaworthy condition and, for all that appears in the report of the case, this fully performed their contractual obligation. Granted that the failure to make a proper adjustment of the cut-off device may have been a breach of warranty on the part of the charterer, which might have precluded it from claiming indemnity from the stevedoring contractor, there was no basis for charging the shipowners with the charterer's contractual obligations. It was thus error to say, as did the Court of Appeals (Appendix A, *infra*, p. 20), that supplying a winch with an improperly adjusted safety cut-off device (as in *Crumady*) was no less a contractual violation than the supplying of the defective cargo light in the present case.

Apart from contract, the shipowner's duty to the stevedoring company was merely to use reasonable care,

* The report in this case refers to them as employees of the ship, 358 U.S. at p. 426. However, the ship was then under charter. (See report of the case in the District Court, 142 F. Supp. 389, at p. 401.) The terms of the charter are not reported.

since the non-delegable duty to furnish a seaworthy vessel does not extend to the stevedoring contractor. *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959). In the *Crumady* case, this duty appears to have been fully discharged, and there is no suggestion that the shipowners were negligent. Indeed, as the Court of Appeals noted (Appendix A, *infra*, p. 19), "the claim was never raised by the plaintiff in *Crumady* that the shipowner was negligent in supplying an improperly set cut-off device." Since there was no finding of negligence on the part of the shipowners, there could be no finding of breach of a duty not to be negligent.

Thus the present case is wholly unlike *Crumady*. Here we have a shipowner who has warranted to supply a stevedoring contractor with reasonably safe equipment and has negligently failed to do so. Because of this breach of duty, a longshoreman has been injured. Nevertheless, the shipowner seeks indemnity from the stevedoring contractor on the theory that the contractor has warranted to give workmanlike stevedoring service and has failed to do so. Both warranties arise out of the same contract; both breaches of warranty are proximate causes of the injury; both parties have equally failed to use reasonable care.

We think it evident that the Court of Appeals has attributed a significance to this court's opinion in *Crumady* which it does not deserve. That case dealt primarily with two questions — whether the vessel was unseaworthy, and whether the shipowner could recover as third-party beneficiary under the contract between the charterer and the stevedoring contractor. No attention whatsoever was given in the majority opinion to the point raised in the present case. Moreover, as we read the opinion of MR. JUSTICE HARLAN, no question of breach of warranty by the

shipowner was considered by the dissenting justices. The views expressed by them related rather to the question whether the stevedoring contractor should be held liable unless its negligence was the substantial cause of the injuries to the longshoreman.

The truth of the matter is that the Court of Appeals has jumped to conclusions which we venture to say will be received with much surprise by this court. Nevertheless, as long as this case remains unreviewed, it is bound to have a disturbing influence on other courts which will be called upon to interpret the *Crumady* case, even though they will have more opportunity for reflection on the significance of that case than was afforded to the judges of the court below.

III.

The Decision Below Conflicts with the Decisions in Other Circuits.

In *Hagans v. Farrell Lines*, 237 F. 2d 477 (3 Cir. 1956), a longshoreman had been struck by a load carried by a defective winch. In answer to specific interrogatories, a jury found that the defective winch was the principal but not the sole cause of the accident, and that there was concurring negligence on the part of employees of the stevedoring contractor which contributed to the accident. The court held that the shipowner was not entitled to indemnity from the stevedoring contractor, pointing out that under the contract the shipowner had assumed an express obligation to the stevedoring contractor to furnish adequate winches in good order and to maintain and repair them. The court reasoned that if the longshoreman had brought suit against the stevedoring contractor and recovered damages, the stevedoring contractor might have asserted

a claim for indemnity against the shipowner and, under the principles laid down in the case of *Mowbray v. Merryweather* (1895), 2 Q.B. 640, would have been entitled to recover indemnity. *A fortiori* the shipowner could not be entitled to indemnity from the stevedoring contractor where the longshoreman elected to sue the shipowner.

In *Smith v. Pan-Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957), the ship boss (a supervisory employee of the stevedoring contractor) after having reported to the ship's officers the defective condition of a winch supplied by the shipowner and being aware that it had not been remedied, nevertheless permitted his men to use it, with the result that one of them was injured. The court held that the shipowner which had been held liable for the injury because of the defective condition of the winch, was not entitled to recover indemnity from the stevedoring contractor, saying (at p. 423):

> "* * * On this point the case is almost on all fours with Hagans v. Farrell Lines, 3 Cir., 237 F. 2d 477. In that case, the Court pointed out (at page 482) that the shipowner based its claim, partly at least, 'upon the asserted neglect of Lavino (the stevedore) * * * in using the winch knowing its condition to be defective.' The Court refused to allow indemnity, saying, 'Knowledge of and acquiescence in the existence of a defective appliance or condition may prevent the fruition of the right to indemnity. Restatement, Restitution, Sections 93 and 95, and Reporters' Notes. But it does not necessarily follow that the burden of indemnity is thereby created. * * * Nothing in the record suggests intentional or reckless conduct on the part of Lavino which would permit the conclusion that Lavino's violation of duty toward Farrell supersedes Farrell's violation of duty toward Lavino. See Restatement, Restitution, Section 97.' Here, Ryan's conduct in allowing its men to continue to work with

the defective winch is not being reckless or intentional, Ryan's negligence in that respect does not supersede Pan-Atlantic's violation of its duty to furnish Ryan with seaworthy equipment."

On appeal, the Court of Appeals for the Third Circuit affirmed, *per curiam*, saying (*Smith v. Pan-Atlantic Steamship Corporation*, 254 F. 2d 600, at p. 601):

> "We find no essential difference between this case and our own decision in Hagans v. Farrell Lines, Inc., 3 Cir., 1956, 237 F. 2d 477, although a distinction has been urged."

The *Hagans* case was followed in *Trygstad v. States Marine Corporation*, 150 F. Supp. 556 (D. Ore., 1957), where the shipowner furnished a defective wire which the stevedoring contractor's employees handled negligently by placing an excessive strain upon it.

The Court of Appeals for the Second Circuit has not ruled on the precise point. However, in the opinion of JUDGE SWAN in *American Mut. Liability Ins. Co. v. Matthews*, 182 F. 2d 322 (1950), the question is dealt with in language cited with approval in the *Hagans* case. Cf. *Torres v. The Kastor*, 227 F. 2d 664 (2 Cir. 1955).

The Court of Appeals for the Ninth Circuit has cited and followed the *Matthews* case in *Amerocean Steamship Co. v. Copp*, 245 F. 2d 291 (9 Cir. 1957).

These decisions are directly in conflict with the holding of the court below in the present case.

CONCLUSION

Weyerhaeuser made it clear that a shipowner might be precluded from recovering indemnity from a stevedoring contractor because of conduct rendering it inequitable to

hold the contractor liable on its warranty. *Crumady* did not purport to overrule or modify this doctrine. Yet, if the Court of Appeals is correct, *Crumady* really took the heart out of it; for if the negligent failure to furnish reasonably safe equipment in breach of shipowner's warranty as well as of its duty to use reasonable care is not such conduct as would render it inequitable for the shipowner to hold the stevedoring contractor liable on its warranty to furnish workmanlike service, then it is difficult to imagine any conduct which could have that effect. If the Court of Appeals is wrong, then it is certainly imperative that its decision be reviewed and reversed. If it is right, then the industry and the lower courts need an authoritative statement from this Court as to just what conduct on the part of a shipowner will preclude recovery under the doctrine of *Weyerhaeuser*.

This is an area of law in which the dust had begun to settle after years of confusion, and it is most unfortunate that a new element of uncertainty has now been injected into what has heretofore been thought to be a clearly established rule that where the shipowner and the stevedoring contractor are each guilty of concurring acts of negligence in violation of their mutual contractual obligations, neither can recover indemnity from the other.

It is for these reasons that we urge that this petition should be granted.

Respectfully submitted,

WILLIAM L. MARBURY,
JESSE SLINGLUFF,
MATHIAS J. DEVITO,
Attorneys for Petitioner

APPENDIX A

OPINION OF COURT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7804

Calmar Steamship Corporation, a Delaware corporation, Defendant and Third-Party Plaintiff,
Appellant,

versus

Nacirema Operating Company, Inc., a body corporate, Third-Party Defendant,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE, ROSZEL C. THOMSEN, District Judge.

(Argued March 13, 1959. Decided April 8, 1959.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

George W. P. Whip and Robert E. Coughlan, Jr., (Lord, Whip & Coughlan on brief) for Appellant, and Jesse Slingluff, Jr., and Mathias J. DeVito for Appellee.

SOBELOFF, Chief Judge:

This is an appeal from the District Court's judgment denying a shipowner indemnity from a stevedoring con-

tractor for the amount recovered from the shipowner by an injured longshoreman-employee of the stevedore.

The longshoreman, Joseph Oleszczuk, was struck and injured by a cargo light which came loose from its cable when thrown into number 4 hold of the S.S. Portmar by a deckman who was also an employee of the stevedore. Oleszczuk brought suit against the Calmar Steamship Corporation, owner and operator of the ship, charging that his injury was due to the unseaworthiness of the vessel and the negligence of her owner. Calmar impleaded Nacirema Operating Co. Inc., the stevedore, as a third-party defendant, claiming indemnity for any amount which it might be obligated to pay Oleszczuk.

The evidence shows that the light which struck the plaintiff had a single bulb screwed into a large bell-shaped metal reflector, to which was joined a metal handle. A cable of electric wires passed through a small circular opening at the top of the reflector and the wires were supposed to be securely attached to terminal screws. It is customary, as an extra precaution, for the ship's crew to tape or tie the cable to the handle on the reflector in order to relieve the strain on the terminal screws. When so arranged, the lights are said to be "seized."

In accordance with the contract between the owner and the stevedore, the ship supplied the cargo lights. The one supplied for hold number 4, in which the plaintiff was working, had not been seized. The stevedore's deckman not only accepted and used the unseized light, but threw it over the side of the hold so roughly that the light was jerked from the cable and fell into the hold, injuring the plaintiff.

In response to written interrogatories, the jury found that the ship's crew had been negligent in regard to the light, and that the light constituted an unseaworthy appliance. Both the negligence and the unseaworthiness were found to be proximate causes of the accident. The stevedore was also found to be negligent, both in having used an unseized light and in having lowered it in an unsafe man-

ner. The latter was declared by the jury to be also a proximate cause of the accident.

A judgment for $35,000 was entered in favor of Oleszczuk against Calmar, and this recovery is not in issue here. The sole remaining question, whether Calmar is entitled to indemnity from Nacirema, was submitted to the District Judge with the understanding that the jury's findings would control "as far as they go."

The court ruled first that any claim which Calmar might have against Nacirema must be based upon the contractual relationship between them. Citing *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956), and *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958), the court said that a service contract such as the one here involved implies a promise by the expert stevedore to perform "with reasonable safety" and that this obligation relates not only to the handling of cargo, as in *Ryan*, but to the use of equipment incidental thereto, as in *Weyerhaeuser*. The District Court then held that the manner in which Nacirema had used the cargo light constituted a breach of this contractual duty.

Next, the court considered the limitation on the shipowner's right of indemnity, expressed by the Supreme Court in *Weyerhaeuser* in the words, "absent conduct on its part sufficient to preclude recovery." While it was pointed out that the Supreme Court had not yet specified what conduct on the part of the shipowner would be sufficient to preclude recovery, the District Court reasoned that, to bar recovery, the shipowner's conduct would have to amount to a breach of a contractual duty owed by it to the stevedore. The court then decided that while the contract involved here provided simply that Calmar would supply lights for night work, it was obligated to supply lights which were reasonably safe, and that those supplied failed to satisfy this obligation. In these circumstances, the court concluded that having breached the contract, Calmar's conduct was "sufficient to preclude recovery" of indemnity.

Since this decision by the District Court, however, the Supreme Court has adjudicated *Crumady v. Fisser*, U.S. ; 27 Law Week 4158. While this also does not undertake a definitive statement of the conduct on the part of the shipowner which will bar indemnity, it indicates that furnishing defective equipment will not necessarily have that effect.

There, the ship supplied loading and unloading gear which included a safety cut-off device for the winch, set by the ship's crew at twice the rated limit of the rigging. This was said by the Supreme Court to be no different in principle from loading and unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved. The winch was found to make the vessel *pro tanto* unseaworthy. The Supreme Court said:

> "For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel" (p.).

Nevertheless, the ship was allowed to recover over for the stevedore's negligence which was found to be a breach of its warranty of workmanlike service.

Dissenting, Justice Harlan declared that on the court's premises, that the stevedore merely brought into play an unseaworthy condition created by the vessel itself and that such unseaworthiness was the cause of Crumady's injuries, he did not think the decision or the underlying principles in *Ryan* justified an award of indemnity to the owner of the steamship "Fisser." This view, however, did not prevail and, as we are bound to conform to the majority view, the argument urged upon us by the stevedore cannot prevail here.

The stevedore attempts to distinguish *Crumady*, arguing that in that case the shipowner supplied adequate equipment but merely failed to make it safe against the negligence of the stevedore. A similar observation might be made here, for there is no way of knowing whether the cargo light would have come loose if the deckman had not thrown it into the hold roughly. In any event, we do

not think that *Crumady* can be read in that manner, for the majority opinion clearly indicates that the equipment provided by the ship was itself considered unsafe and inadequate for the purpose for which it was supplied, and the case was decided on this view of the facts.

Nor do we think the cases distinguishable on the ground that here the triers of fact found that the supplying of defective equipment constituted unseaworthiness and negligence, while in *Crumady* the trier of fact found simply that the defective equipment made the ship unseaworthy but made no specific finding as to negligence. The claim was never raised by the plaintiff in *Crumady* that the shipowner was negligent in supplying an improperly set cut-off device.[1] The fact that such a finding was made in this case is not determinative of the right of the shipowner to recover indemnity. The action over is in contract, and whether the shipowner can recover turns upon whether his actions are such as to bar the enforcement of the contract, and not upon whether he has or has not been found negligent in regard to the longshoreman.

Of little consequence also is it that the actions of the stevedore were found by the District Court to be the primary cause of the accident in *Crumady*, while the District Court in this case found the actions of the stevedore only a contributing proximate cause. The Supreme Court in *Weyerhaeuser* pointed out "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate" (page 569).

In determining whether the actions of Calmar were such as to bar recovery, we must necessarily compare them to

---

[1] The claim was that the ship was negligent in supplying a worn and defective topping lift. The District Court's finding was to the contrary on this issue. The Circuit Court pointed out that the District Court's finding of unseaworthiness in regard to the incorrectly set cut-off device was based upon a theory which the libellant had not pleaded or attempted to establish in his proof. The appellate court found on the facts that the setting of the cut-off device did not make the winch unseaworthy, but the Supreme Court disagreed and restored the District Court's finding of unseaworthiness.

those of the owner in *Crumady*. Here, the ship did not inspect the light and did not provide seizing. In *Crumady* the ship's crew supplied a cut-off device which they had set at twice the rated limit of the rigging. Certainly supplying the defective cut-off device was no less a contractual violation there than the supplying of the unseized cargo light here. If the former did not preclude recovery, then, under the principle announced in *Crumady*, we think the latter should not.

Reversed, with direction to enter judgment for Calmar Steamship Corporation.

APPENDIX B

THE JUDGMENT

UNITED STATES OF AMERICA, ss:

The President of the United States of America:

To the Honorable Judge of the United States District Court for the District of Maryland.

Greeting:

WHEREAS, lately in the United States District Court for the District of Maryland, before you or some of you, in a cause between Joseph Oleszczuk, Plaintiff, and Calmar Steamship Corporation, Defendant and Third Party Plaintiff, and Nacirema Operating Company, Inc., Third Party Defendant; Civil Action No. 9179; wherein the judgment of the said District Court, entered in the said cause on the 8th day of September, 1958, is in the words following:

"A motion having been presented to the Court by the defendant and third party plaintiff, Calmar Steamship Corporation, for entry of judgment in favor of the defendant and third party plaintiff against the third party defendant, Nacirema Operating Company, Inc., for indemnity on the third party complaint and a motion having been presented by the third party de-

fendant Nacirema Operating Company, Inc. for entry of judgment in favor of the third party defendant on the third party complaint, and said motion having come on for a hearing where counsel for both parties were heard,

"It Is Hereby Ordered this 8th day of September, 1958, that the motion of the defendant and third party plaintiff for entry of judgment for indemnity on the third party complaint against the third party defendant be denied and the third party defendant's motion for entry of judgment in its favor on the third party complaint be granted and it is further Ordered that judgment on the third party complaint be entered in favor of the third party defendant with costs.

Roszel C. Thomsen,

Chief Judge.

"The above Order and Judgment is consented to as to form.

Lord, Whip and Coughlan
Lord, Whip and Coughlan"

as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Fourth Circuit, by virtue of the appeal of Calmar Steamship Corporation, a Delaware corporation, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the term of March, in the year of our Lord one thousand nine hundred and fifty-nine, the said cause came on to be heard before the said United States Court of Appeals for the Fourth Circuit, on the said record, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United

States District Court for the District of Maryland, at Baltimore, with direction to enter judgment for Calmar Steamship Corporation, in accordance with the opinion of the Court filed herein.

April 8, 1959.

SIMON E. SOBELOFF,

Chief Judge, Fourth Circuit.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and the judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the 11th day of May, in the year of our Lord one thousand nine hundred and fifty-nine.

RICHARD M. F. WILLIAMS, JR.,

Clerk of the U. S. Court of Appeals for the Fourth Circuit.

FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 2 1959
E. K. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 99

NACIREMA OPERATING COMPANY, INC.,
Petitioner,

vs.

CALMAR STEAMSHIP CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE W. P. WHIP,
ROBERT E. COUGHLAN, JR.,
823 Munsey Building,
Baltimore 2, Maryland,
Attorneys for Respondent.

The Daily Record Co., Baltimore 3, Md.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 983

NACIREMA OPERATING COMPANY, INC.,
Petitioner,

vs.

CALMAR STEAMSHIP CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported in 164 F. Supp. 628. It is printed beginning on page 80 of the record known as the Joint Appendix.[1] The opinion of the Court of Appeals for the Fourth Circuit is not yet reported.

[1] Hereinafter referred to as "A".

JURISDICTION

Judgment of the Court of Appeals was entered on April 8, 1959. The Petition for a Writ of Certiorari was filed on June 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

When a longshoreman uses an appliance which the shipowner agreed to furnish and furnished and the longshoreman before using it knew it to be defective but negligently went ahead and used it anyway and used it in an improper and negligent manner all of which the Court found to be a breach of the contracting stevedore's contract to do its work in a safe and workmanlike manner which breach caused or contributed to an injury to another longshoreman, does the shipowner who was found liable to the injured longshoreman because of unseaworthiness and negligence forfeit his right to indemnity against the stevedoring company?

STATEMENT OF THE CASE

Pursuant to a contract entered into between Calmar Steamship Corporation, owner and operator of the SS PORTMAR, and Nacirema Operating Company, Inc., a stevedoring company, whereby Nacirema agreed and undertook to load the SS PORTMAR, on December 6, 1955, at Sparrows Point, Maryland, loading operations were in progress (Third Party Complaint A. 1: Answer to Third Party Complaint A. 2; Court's Exhibit No. 1 A. 76; Robak A. 8; Rutkowski A. 16; Moulton A. 38). About 4:45 p.m. on said day while one of Nacirema's employees who was stationed on the deck of the PORTMAR at No. 4 hatch was attempting to pass one of the ship's cargo lights to men working in

No. 4 lower hold, the electric cable which was made fast in the top of the light parted and the light fell and struck the Plaintiff, one of Nacirema's employees, on the head causing him injuries (Robak A. 9-13; Gryzbowski A. 15-16; Rutkowski A. 16-28). Plaintiff, the injured man, filed suit against Calmar Steamship Corporation wherein Calmar filed a Third Party Complaint against Nacirema.

The light which the stevedore selected to pass to the men working in No. 4 lower hold was a new one and one of several which were placed on the deck of the vessel for use of the stevedores. It weighed about 8½ pounds and the electric cord was made fast in the top of the light (Opinion A. 81-82; Moulton A. 38-41; Rutkowski A. 17-18, 27). At the trial the stevedore who handled the light claimed that it was the only one in the vicinity of No. 4 hatch which had a good bulb (Rutkowski A. 18). He claimed further that while the light appeared to be a new one the customary handle at the top with which to carry it was missing (Rutkowski A. 20). He said that it had no lanyard, described as a small rope attached to the handle of the light with which to hand it on a beam or other place in the hatch and he testified that the electric cord was not seized or tied to the handle in order to take the weight of the light off the cord (Rutkowski A. 18-20; Opinion A. 80-82). And this stevedore admitted that he made no complaint to any of the officers on the ship in respect to the condition of the light or that it was the only light in the vicinity of No. 4 hatch which was equipped with a serviceable bulb (Rutkowski A. 26).

Mr. Moulton, Chief Mate of the SS PORTMAR, testified at the trial that the light was a new one which he had put on the deck on the morning of December 6, 1955, and that while it had no lanyard on it and was not seized, he had

instructed the Boatswain to equip it with a lanyard (Moulton A. 39, 41, 50). He testified further that the light had a handle, that new lights are often used without being seized and that contrary to testimony given by Plaintiff's witnesses the practice is safe if the lights are handled properly (Moulton A. 41, 45, 48-50; Harper A. 29-30; O'Callaghan A. 32-34, 36). Both Mr. Moulton and Mr. White, Second Mate on the PORTMAR, testified that the stevedore who handled the light, handled it improperly. They said that the stevedore grasped it with the electric cord and swung it over the hatch coaming bringing the light up on the cord with a jerk which caused the cord to part from the light and the light to fall into the hold (Moulton A. 43, 46-48; White A. 53-54, 56-58).

The verdict of the Jury consisted of answers to eleven questions submitted to it by the Court. The questions and answers will be found beginning on page 71 of the Joint Appendix. Questions 1, 2, 3, 4, 9, 10 and 11 with their respective answers are herewith set forth:

"1. Under all the facts of this case, was the SS PORTMAR, at the time and place of the injury complained of, unseaworthy in respect to the cargo light?

Yes X No

2. If you find such unseaworthiness, was such unseaworthiness a proximate cause of the injuries sustained by the Plaintiff?

Yes X No

3. Under all the facts of this case, was the Calmar Steamship Corporation, or any member of the crew of the SS PORTMAR, negligent in respect to the cargo light?

Yes X No

4. If you find such negligence, was such negligence a proximate cause of the injury sustained by the plaintiff?

Yes X No

9. Was the cargo light lowered in a negligent manner?

Yes X No

10. If the answer to question 9 is 'Yes', (a) was the manner in which the cargo light was lowered the sole proximate cause of the accident, or (b) was the manner in which the cargo light was lowered a proximate cause of the accident?

(a) Yes No X

(b) Yes X No

11. Were the stevedores negligent in using a cargo light that was not seized?

Yes X No"

The District Court held that Nacirema breached its contract with Calmar to do its work in a careful and workmanlike manner and that the breach by Nacirema caused or contributed to Plaintiff's injuries (Opinion A. 88-89). But the Court held further that because the appliance was furnished by Calmar pursuant to its contract with Nacirema, Calmar forfeited its right to indemnity from Nacirema.

ARGUMENT

I.

THE OPINION OF THE COURT OF APPEALS CONFORMS TO THE OPINIONS OF THIS COURT.

In *Ryan Stevedoring Company, Inc. v. Pan Atlantic Steamship Corporation*, 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232, decided on January 9, 1956, this Court held that the ship involved was made unseaworthy because of improper stowage and that because the ship was unseaworthy, Plaintiff, a stevedore, should recover against the ship-

owner. It was held further that the contract between the shipowner and *Ryan* the stevedoring company implied that *Ryan* would do its work in a safe and workmanlike manner and that as the ship had been made unseaworthy by the fault on the part of the stevedoring company in the matter of stowing cargo, the fault on the part of the shipowner to discover and correct the defect in the stowage should not prevent the shipowner from recovering indemnity from the contracting stevedore for its breach of contract to stow safely.

In *Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*, 355 U.S. 563, 2 L. Ed. (2d) 491, 78 S. Ct. 438, decided on March 3, 1958, this Court extended the doctrine of the *Ryan* case by applying it to the negligent use of ship's appliances by stevedores and to negligence on the part of the shipowner as well as unseaworthiness. Furthermore, in that case on page 569, this Court said:

> "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate".

And in *Crumady v. J. H. Fisser*, 358 U.S. 423, decided by this Court on February 24, 1959, after citing with approval the *Ryan* and the *Weyerhaeuser* decisions this Court said:

> "We conclude that since the negligence of the stevedores which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

Clearly, therefore, Judge Sobeloff, speaking for the Court of Appeals for the Fourth Circuit was right when he said:

> "In determining whether the actions of Calmar were such as to bar recovery, we must necessarily compare them to those of the owner in *Crumady*. Here, the ship

did not inspect the light and did not provide seizing. In *Crumady* the ship's crew supplied a cut-off device which they had set at twice the rated limit of the rigging. Certainly supplying the defective cut-off device was no less a contractual violation there than the supplying of the unseized cargo light here. If the former did not preclude recovery, then, under the principle announced in *Crumady*, we think the latter should not."

II.

LOWER COURTS HAVE HELD THAT STEVEDORES WHO KNOWINGLY USE DEFECTIVE APPLIANCES BREACH THEIR CONTRACTS TO PERFORM THEIR WORK IN A SAFE AND WORKMANLIKE MANNER WHICH ENTITLES SHIPOWNERS TO INDEMNITY.

American President Lines Ltd. v. Marine Terminals Corp., 234 F. (2d) 753 (C.C.A. 9);

Pierce v. Erie Railroad Company, et al., 165 F. Supp. 216 (S.D.N.Y.);

Shannon v. United States, 235 F. (2d) 457 (C.C.A. 2);

Ignatyuk v. Tramp Chartering Corp., 250 F. (2d) 198 (C.C.A. 2);

Thomas Berti v. Compagnie de Navigation Cyprien Fabre, 213 F. (2d) 397 (C.C.A. 2).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE W. P. WHIP,

ROBERT E. COUGHLAN, JR.,

Attorneys for Respondent.